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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	)	
	)	
Telecommunications Relay Services and Speech to	)	CGB Docket 03-123
Speech Relay Services for Individuals with Hearing	)	
and Speech Related Disabilities	)	
	)	
To: The Commission	)	

COMMENTS ON INTERSTATE RELAY SERVICES FUND PAYMENT FORMULA AND FUND SIZE ESTIMATE

HANDS ON VIDEO RELAY SERVICES, INC.

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Summary

Hands On Video Relay Services, Inc. ("Hands On") opposes the adoption of any of NECA's proposed 24 different potential rates for video relay service ("VRS"). Instead the FCC should task NECA with recommending a multi-year tiered rate structure. While it is considering and adopting such a rate structure, the FCC should, on an interim basis, either continue the existing VRS rate or adopt a simplified tiered structure.

NECA's proposed rates are the result of a process that remains flawed. The rate setting process is still not transparent. The public and providers are unable to verify what NECA does and therefore cannot meaningfully comment on the reliability and validity of its proposed rates. The NECA Fund Filing omits key data, including even identification of items NECA excluded from some of its rate calculations. Most astonishing is that NECA omitted data for VRS and IP Relay which it provided for traditional TRS and Speech to Speech ("STS") relay. How can the public comment on NECA's recommendations when it is left in the dark with respect to what NECA has done?

With respect to adjustments to Hands On's own cost data, NECA did not even bother to consult with Hands On before excluding costs: (1) for research and development expense needed to begin the process of meeting the waiver for

automatic routing of 911 calls, and (2) excluding the costs of certified deaf interpreters ("CDI"). The omission of research and development funds needed to meet the 911 waiver is irrational. The FCC, consumers and providers are all in agreement that this is a priority item essential to functional equivalence. Yet NECA relies on prior FCC decisions holding that functional equivalence is defined by the mandatory unwaived standards. It is time for the FCC to recognize those decisions as erroneous and hold that research and development expense to meet temporarily waived standards is an appropriate relay expense. With respect to CDIs, they are required by Section 64.604(a)(iv)'s mandate that VRS providers supply qualified interpreters. As the interpreting industry has long recognized, in some circumstances, CDIs are necessary to provide effective communication.

NECA's contemplation of rates based on the potential elimination of marketing and/or outreach expenses is unwarranted and inconsistent with the FCC's Part 32 and Part 36 rate of return regulations. Marketing and outreach expense are legitimate and necessary expenses of relay. Only a fraction of deaf and hard of hearing persons who could benefit from VRS currently use the service. Marketing and outreach efforts are necessary to find these potential consumers and educate them about the service. Marketing and outreach further benefits consumers who need to know which providers offer specific features that meet their unique functionally equivalent needs for communicating.

The fundamental problem with each of NECA's 24 "recommended" VRS rates is that each is based on a weighted average methodology. However, the VRS market is skewed due to the past anti-competitive conduct of the dominant provider, which has a market share estimated at some 80 percent. A weighted average rate fails to account for the substantial economies of scale that provider enjoys. As such any weighted average rate is likely to overcompensate the dominant provider and under-compensate all other providers. The FCC previously recognized this problem in 2005 when it opted to set the VRS rate at the median cost of the VRS providers. It is time to take that decision one step forward and implement a multi-tiered rate which would fairly compensate all providers without over-compensating any.

Since the necessary data to fashion a tiered rate structure is not publicly available, the FCC should task NECA, in consultation with the TRS Advisory Council, providers and consumers to recommend a tiered rate structure. In the interim, the FCC should continue the present rate or adopt a temporary simplified tiered rate.

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Hands On Video Relay Services, Inc. ("Hands On"), by counsel, and pursuant to FCC Rule Section 1.415, comments on the National Exchange Carrier Association, Inc.'s ("NECA") May 1, 2007 Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate ("Fund Filing"). As we show below, adoption of any of NECA's Fund Filing's recommended formulae for compensation of Video Relay Service ("VRS") would disserve the public interest. Rather, the FCC should adopt for a minimum three-year period a tiered VRS compensation mechanism that will serve to promote competition and consumer service while protecting and conserving the Interstate TRS Fund. In support, the following is shown.

I. Overview of NECA's Fund Filing.

Departing from previous Fund Filings, NECA this year proposes a range of 24 different VRS rates due, inter alia, to the pendency of the FCC's proceeding looking to fashion a VRS compensation methodology. These 24 rates run from $6.7738 to $4.3480. The highest $6.7738 rate is based on provider cost and demand projections. NECA then presented three adjustments to that rate, eliminating marketing ($6.7041), eliminating outreach ($6.5057), and eliminating both marketing and outreach ($6.4370). NECA presented five other VRS rate scenarios. It took the provider cost estimates and divided them by the demand it projected rather than the provider projected demand, having the effect of decreasing the cost per minute by $. 40. Second, NECA made certain largely unstated adjustments to provider costs, resulting in decreasing the rate to $6.1393. Third, NECA took that adjusted rate and spread it over its projected demand to get to a rate of $5.7768. Fourth, NECA presented what it claims is the historical cost of VRS – apparently for calendar year 2006 -- of $4.5568.[1] Fifth, NECA presented what is claims is the historical cost adjusted for inflation, $4.7639. To each of these five base rates, NECA then presented what the rate would be without marketing, without outreach and without marketing and

[1]NECA admits that the median actual reported cost for 2006 is $6.1813. NECA does not explain why it did not base a proposed rate on the median reported cost.

outreach. The full matrix of NECA's 24 various rate recommendations is set forth in the following table:[2]

[2]NECA proposed these various alternative compensation formulae for each of the several relay services, ranging from \$1.8747 to \$1.5601 for traditional TRS, \$1.2863 to 1.1002 for IP Relay, and \$3.2596 to \$2.4954 for STS. *See* Fund Filing at Exhibits 1.1b, 1.2b and 1.3b.

As we show below, the FCC should reject each of NECA's "recommended" 24 VRS rates; instead the FCC should adopt a three-year, tiered rate.

II. The rate setting process continues to be beset by problems.

NECA's positing of 24 separate potential VRS rates underscores that the VRS rate setting process remains seriously flawed. The process continues to lack transparency and key cost issues remain unresolved. Moreover, the lack of clear rules and policies as to appropriate cost elements has resulted in NECA essentially punting and instead proposed 24 different rate possibilities for the FCC's and commenters' evaluation.

A. The rate process is not transparent.

NECA continues to recommend rates largely out of the public eye. Hands On has long favored the public release of any data upon which NECA recommends or the Commision decides VRS rates. This is the only way providers and the public can meaningfully comment on the reasonableness of provider submitted data or NECA's and the FCC's review of that data. There is no competitive damage in making this data public as it is merely projections, not operational data.[3] Indeed, Hands On has in the past openly discussed on the

[3]Hands On also favors the public release of provider performance data, including minute volume and answer speed. Ratepayers, who are paying for the service, should know what they are getting for their money, and consumers, who are using the service, should be in a position to know the quality of service they can expect from TRS

public record adjustments and exclusions made to its cost and demand data and is aware of no competitive disadvantage resulting from its having done so. *See, e.g.,* Application for Review, CC Docket 98-67 (July 20, 2004). Hands On is doing so in this filing as well. There is no public interest advantage in keeping this type of data off the record, while there is sizable public harm in the system that exists today which lacks transparency. To bring transparency to the process, provider demand and cost projections should be made on the public record as should any NECA or FCC exclusions or adjustments to such data.

1. The public cannot verify what NECA did or comment on its reliability.

Because the data on which NECA relied in fashioning its 24 separate rate recommendations is not public, it is not possible to comment meaningfully on how each rate recommendation was derived. It is not possible to know if NECA made a mistake in its computations.[4] It is not possible to know if the data suggest some other rate or rates than the 24 different rates NECA proffered.

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providers.

[4]This is far from an academic objection as Sorenson last year documented a plain error in NECA's calculation of rate of return.

The APA contemplates meaningful comments from the public. This can only be accomplished through release of the underlying data upon which NECA recommends and the FCC acts.

2. NECA's Fund Filing omits key data.

Review of the Fund Filing shows NECA has omitted key data necessary to evaluate the reasonableness and validity of its disparate rate recommendations. For example, there is virtually no discussion of what exclusions NECA made to the VRS cost estimates. The Fund Filing merely states that some providers "included Research and Development costs in their projections previously determined to be not allowable for recovery from the fund." Fund Filing at 20. The amount of such costs is not stated, nor is there any indication of the justification such providers may have made to support R&D costs. Even more cryptic is the following:

> Additionally, two providers included projected costs associated with relay center operations and indirect expenses that appear to be beyond the scope of meeting the minimum requirements of providing VRS.

Id. How is anyone going to evaluate that statement? NECA fails to state (1) what these expenses were for; (2) what was the amount of these expenses; (3) how it arrived at the conclusion that these expense were beyond the scope of meeting minimum requirements; and (4) what were the "minimum requirements of providing VRS" that it applied in rejecting these costs. As far the public knows, NECA's exclusions could be the result of arbitrariness or just plain ignorance of what is necessary to provide VRS. In the absence of publicly released justification for omitting specifically identified provider proposed costs, NECA's cost exclusions must be rejected.[5]

3. NECA omitted data for VRS and IP Relay it provided for traditional relay and STS.

[5]NECA's vaunted desire to protect confidentiality of VRS providers' data – as mistaken a view as that may be – did not require NECA to withhold information concerning these excluded costs. NECA could very well have stated without revealing who proposed the cost (1) the nature of the proposed cost; (2) the amount of such cost; (3) the provider's justification for such cost; (4) and why NECA believed the cost does not qualify for inclusion in the rate. Its failure to do so leads one to suspect it simply did not want to be bothered or that it could not easily justify its exclusion.

It is particularly frustrating that NECA's Fund Filing inexplicably omitted data for VRS and IP Relay which it provided for both traditional relay and for STS. Specifically, NECA presented in Exhibit 1-1a total estimated minutes and cost per minute for data for each traditional relay provider both for 2007 and for 2008 (without disclosing the identity of the individual providers). In Exhibit 1-3a, NECA presented the identical data for each STS provider (again without disclosing the identity of the individual providers). Yet, for IP Relay and VRS, NECA merely and without explanation presented aggregate data. *See* Exhibits 1-2a and 1-4a. The omitted data are highly relevant, for review of the traditional TRS and STS data show an apparent correlation between projected demand levels and projected costs.

Furthermore, by omitting even a listing of the various per minute rates proposed by the various VRS providers, NECA denies the Commission and the public with the ability to determine the median VRS provider rate for 2007-08. This again is a significant and troublesome omission for at least two reasons. First, the Commission in the 2005-06 rate cycle chose, partially at NECA's urging, to adopt the median VRS provider rate, and continued that rate through the 2006-07 rate cycle. It is astonishing then that NECA would not even bother to report what that rate would be to the Commission and the public, especially since Hands On understood NECA officials at the April TRS Advisory Council meeting to state that the average unweighted reported rate from VRS providers was approximately $7. Second, there are additional clear indications that the median rate for 2007-08 is a vary material bit of information. NECA reports at note 44 of the Fund Filing that the median actual reported cost for 2006 was $6.1813 as opposed to the supposed weighed average actual cost of $4.5568.[6] The disparity between the weighted average and the median raises clear issues whether any rate based on a weighted average methodology would fairly compensate the majority of VRS providers.

NECA owes it to the VRS consuming public, to providers and to the public at large to explain why these key data were omitted. Was NECA under some off the record mandate to omit that data? Hands On specifically asked NECA to provide data as to the median provider cost, and NECA failed to respond by the date of the filing of these comments. The Commission cannot adopt any new rate, much less any of NECA's 24 proffered rates, without the public having access to this information.

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[6]It is unclear if any costs were excluded from NECA's calculation of this figure.

4. NECA and FCC continue to have off the record discussions bearing directly on rate issues.

The NECA Fund Filing is troubling as well because there is no indication that the FCC and NECA have ceased their practice of making policy through off-the-record communications. Hands On has previously pointed out that this practice violates the APA and is inimical to a transparent process. Communications between the FCC and NECA concerning fund administration should be on the record or at the very least subject to the ex parte rules. Except in the case where NECA communicates with the agency concerning possible statutory or rule violations, no basis exists for communications between the administrator and the Commission to be withheld from public knowledge. The Commission needs to fix this problem once and for all to arrive at a transparent rate process.

B. NECA's adjustments to Hands On's data were unjustified.

Although Hands On cannot speak for other providers, the exclusions made to its costs were plainly unjustified.

Preliminarily, however, we note that NECA has once again failed to follow it own announced procedures concerning the exclusion of costs. NECA's announced procedure is that before it excludes any costs, it is to consult with the provider in question to give that provider an opportunity to address NECA's concern with respect to that cost. This is a procedure the FCC has specifically countenance and approved. Despite requesting a host of additional information from Hands On in the course of this rate setting process, NECA (1) at no point asked a single question concerning the costs it eventually excluded from Hands On, (2) sought any justification from Hands On, or (3) otherwise uttered a peep with respect to an intent to exclude these costs. What is the point of announced procedures that are simply ignored?

1. *The FCC cannot expect providers to meet waived standards while denying R&D funds needed to do so.*

NECA advised Hands On May 1, 2007 – the day it made the Fund Filing -- that it excluded R&D expense Hands On had included in its cost submission. Specifically, Hands On proposed $100,000 of R&D expense in 2007 and a like amount in 2008 to start to meet the waived requirement that Hands On automatically route 911 calls to the appropriate public safety answering point ("PSAP"). Routing of VRS 911 calls to the appropriate PSAP is a key public safety concern. It is a matter the FCC has stressed with respect to Internet based telephony. It is a matter with which Hands On and other providers are in frequent contact with the FCC's Consumer and Governmental Affairs Bureau ("CGB") and its Disability Rights Office ("DRO"), often initiated by the FCC. Yet, NECA does not seem to think Hands On should be compensated to meet this requirement because this requirement is waived.

NECA appears to base its view on a prior, ill-advised Commission decision. *See, e.g., Telecommunications Relay Services,* 19 FCC Rcd 12475, 12547-48 (2004) *(2004 FNPRM)*. That decision should be overruled. As we have repeatedly pointed out, a fundamental problem with TRS cost recovery is the Commission's mistaken position that providers are only entitled to compensation for providing relay at the minimum mandatory standards set forth in Section

64.604. An offshoot of this mistaken position is that research and development expense is not compensable beyond that which is necessary to meet un-waived minimum mandatory standards. The problem with this position is that it falsely assumes the Commission has or should have a minimum mandatory standard for every aspect of relay service. The Commission does not have such standards and should not be in the business of micro-managing relay operations.

Simply stated, the "minimum mandatory standard" test is insufficient to evaluate the entire set of relay expenses. This is most significant in the area of engineering and technical expenses. For example, there is no minimum FCC standard with respect to computer platforms for which VRS must be compatible. There is no standard that VRS must be compatible with Microsoft Windows. There is no standard that VRS must be compatible with any video phone device. There is no standard that VRS must be compatible with an Apple MacIntosh computer. There is no standard that VRS must be compatible with any particular computer or video system, although the Commission has clarified that equipment which providers distribute must be backward compatible with the systems of other providers. Yet, unless a provider's VRS is compatible with at least one computer or video system, it cannot provide VRS at all, and if not compatible with each of them, a provider's service would be inaccessible to large numbers of potential VRS users. That would be plainly inconsistent with the intent of Section 225 of the Act that relay service be made widely available to persons needing it.

Similar is the issue of frames per second of VRS transmission. The FCC has no minimum standard for VRS frames per second. Does this mean the Commission will allow engineering costs to achieve only one frame per second, which is clearly insufficient to provide VRS, or will allow the full 30 frames per second video which is the equivalent of full motion television?[7] The "mandatory minimum standard" approach cannot answer that question for the simple reason that the Commission has no mandatory minimum standard for video quality. Yet, plainly some degree of video quality is necessary to provide VRS and allow visual reading of finger spelling at normal conversation speed.[8] A standard which would disallow engineering expenses beyond that necessary to meet "minimum mandatory standards" is simply insufficient to evaluate rationally all VRS costs, engineering or otherwise.

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[7]*See Closed Captioning and Video Description of Video Programming Implementation of Section 305 of the Telecommunications Act of 1996 Video Programming Accessibility*, 11 FCC Rcd 19214 (1996).

[8]Hearing persons after all do not have to alter the speed of their conversations when using any phone service so why should deaf or hard of hearing persons have to alter the speed of their normal conversations?

What then is the appropriate standard for TRS cost recovery? Hands On suggest that the proper standard for judging TRS expenses for which there is no minimum standard, is once again one of reasonableness, having proper regard for the cost to be incurred versus the benefit to be achieved. To hold otherwise would impede the technical development of TRS and VRS service in defiance of the express requirement of Section 225 of the Act, and impose a standard the FCC simply is not and cannot apply without micro-managing every facet of the service.

Section 225 of the Act requires providers to be reimbursed their *reasonable* costs of providing service. Moreover, Section 225 requires the Commission in formulating its regulations for TRS not to discourage technical innovation. Hands On fully agrees with the Commission that Congress's exhortation is not a license to tap the Interstate TRS Fund to provide relay service to deaf, hard of hearing and speech disabled persons beyond that which is functionally equivalent to the telephone service available to hearing persons. But by the same token functional equivalence is not a bare minimal lifeline service. *See 2004 FNPRM* 19 FCC Rcd at 12550-52.

This is aptly illustrated by the FCC's decision not to specify any minimum standard for IP Relay security. As the Commission explained, "We will not require ... that providers adopt any particular technology in this regard. We will allow TRS providers to determine for themselves the level of security they will offer consumers, and the means by which they will protect the privacy of the Internet-based TRS callers and their personal identification information, so that no aspect of a relayed conversation is retrievable in any form." *2004 FNPRM* at para. 51. Since the FCC is not setting a mandatory minimum standard for call security, how is the FCC to evaluate provider costs incurred in ensuring call security? The answer again is the reasonableness standard set forth in Section 225. That standard plainly requires the Commission to evaluate cost versus benefit with due regard for the service the deaf, hard of hearing and speech disabled community receives.

In the instant case, however, we are talking about research and development necessary to meet a waived requirement that the Commission fully intends to apply to VRS. In the *Report and Order* portion of the *2004 FNPRM,* the Commission held that the reasonable costs for which TRS providers will be compensated must relate to the provision of the service in compliance with the applicable non-waived mandatory minimum standards. *2004 FNPRM* at para. 199. Apparently the logic behind this holding was that functional equivalence is determined by the rules' minimum standards that are not waived. *Id.* That is simply wrong. It is not the unwaived minimum standards that determine functional equivalence, it is the *minimum standards* themselves.

By definition, the mandatory minimum standards are those items the Commission considers essential to achieve functional equivalence with the telephone service available to hearing persons. The waivers in question do not change the definition of functional equivalence. The waivers that have been granted including, for example, for automatic routing of emergency calls, have been granted not because they are unnecessary to achieve functional equivalence, but because they are not practicable, or because they are not feasible to implement at this time. *See 2004 FNPRM,* 19 FCC Rcd at 12521-22, 12524-27. Thus, research and development expenses which are designed to meet waived standards are in fact necessary to achieve functionally equivalent VRS. It cannot be the Commission's intention that no research and development expense is allowed for these items which are essential to the provision of TRS to the greatest number of persons needing the service. Those expenses should, therefore, be included in the rate calculation to the extent they are otherwise reasonable.[9]

[9]This is to be contrasted with waivers granted to VRS providers of minimum standards which are not in fact applicable to VRS, such as the communications assistant typing speed requirement.

The exclusion of such research and development costs is contrary to precedent of this Commission and other regulatory bodies. The Commission has held that research and development is an appropriate element of a rate when it is for the benefit of the consuming public. *Communications Satellite Corporation*, 90 F.C.C.2d 1159 (1982). *See also Public Service Company of New Mexico v. FERC*, 832 F.2d 1201, 1214-15 (10th Cir. 1987); Satrom, *Office of Consumers' Counsel v. FERC*, 2 Energy Law Journal 119 (1981); Comments of Ed Bosson in CC Docket 98-67 (May 21, 2004).[10] Where research and development stand to benefit deaf, hard of hearing, and speech disabled consumers, those expenses are manifestly appropriate cost elements to TRS rates if otherwise reasonable.

[10]Mr. Bosson, Texas Relay Administrator, has aptly been described as the father of VRS.

Indeed, exclusion of research and development is particularly inappropriate given Congress's direction to the FCC that its regulations "not discourage or impair the development of improved [relay] technology." 47 U.S.C. Section 225(d)(2). Moreover, the Commission's waiver orders plainly require providers to discuss their research and development efforts designed to meet the waived requirements. *See, e.g., Telecommunications Relay Service*, 18 FCC Rcd 12379 (2003). The clear implication of the requirement to report on research and development efforts is that the Commission expects providers to conduct research and development to meet waived standards. Otherwise, why require the report? This is especially the case given that these waivers are not indefinite.[11] Rather, each waiver is time limited. How can the Commission expect providers ever to meet these waived standards if they cannot build the cost of meeting these standards into the TRS rates? The Commission should not blithely dismiss this Catch 22. Research and development expense should be authorized to meet not only current mandates, but upcoming known, essential requirements as well.

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[11] Were a minimum standard to be permanently waived for any TRS service because the Commission finds that meeting the waiver is not necessary to functional equivalency, it would then be completely reasonable to exclude research and development for such a standard. Such an example again would be the 60 wpm typing standard for VRS interpreters, since that standard is plainly inapplicable to VRS.

Furthermore, the Commission has previously urged providers to work diligently to meet the needs of callers and suggested that competition among VRS providers will achieve that result. *See, e.g., 2004 FNPRM*, 19 FCC Rcd at 12523. The problem with that exhortation, however, is that providers have no financial incentive to spend money to meet waived standards if the Commission limits them only to their costs of providing VRS at the minimum unwaived standard and does not allow them to include the research and development costs of meeting the waived standard in the VRS rate. Given that the Commission expects research and development to meet waived requirements, reasonable research and development expense must be included in the TRS rate. Therefore, the exclusion of Hands On's R&D costs to meet automatic routing of 911 calls must be reversed.

2. NECA's omission of CDI funds was unjustified and contrary to the public interest.

In addition to the R&D expense exclusion, NECA eliminated expense Hands On budgeted for certified deaf interpreters ("CDI").[12] This was error. FCC Rule Section 64.604(a)(iv) requires VRS providers to supply qualified interpreters. The regulation defines a qualified interpreter as "able to interpret effectively, accurately, and impartiality, both receptively and expressively, using any specialized vocabulary." On its face this is a stringent requirement. Not all video interpreters, however, possess the ability to interpret effectively and accurately for all deaf persons who use sign language. The reason is that the language skills and backgrounds of deaf persons vary considerably, just as with hearing persons. Foreign born persons, young children, persons from very rural or isolated areas using "home" signs, persons who are severely physically or mentally ill, deaf persons who are uncomfortable with hearing persons, and deaf persons with non-standard language stills tend to have lower language skills than the average deaf person.

In circumstances such as these, hearing interpreters may not possess sufficient skills to communicate effectively and accurately. In these circumstances effective communication can only be achieved by using CDIs. CDIs have native fluency in American Sign Language, non-standard signing,

[12]Hands On proposed $219,649 in certified deaf interpreter ("CDI") costs for 2007 and $461,261 in CDI costs for 2008.

and possess extensive knowledge and experience in deaf culture with specialized training in gesture, mime and other communications strategies to facilitate communication between deaf consumers, hearing consumers and hearing interpreters. *See* Exhibit 1, RID White Paper on Use of Certified Deaf Interpreters; Exhibit 2, Ontario Interpreter Services Guidelines for Deaf Interpreters; Exhibit 3, Declaration of Ronald E. Obray.

As RID explains, the CDI "can bring added expertise into both routine and uniquely difficult interpreting situations." *See* Exhibit 1. As RID's White Paper makes clear, the use of CDIs is well established in the interpreting industry. Although the vast majority of VRS calls do not require a CDI for effective and accurate interpreting, some calls undoubtedly do. In some instances, use of a CDI is the only way to achieve effective and accurate communication. *Id.* Hands On previously proposed to employ CDIs in the 2006-07 funding year. In excluding these costs, NECA indicated at the TRS Advisory Council meeting, that it did so on the basis that it excluded these costs in the 2005-06 Fund Filing and that the Commission did not overrule its exclusion.

That is not, however, correct. As NECA's 2005-06 Fund Filing makes clear, the CDI position was excluded for that funding year; however, Hands On, the provider which costed for CDIs, did not contest that exclusion. Thus, there was nothing for the Commission to accept or reject. In any event, given the FCC's adoption of an alternative rate methodology for the 2005-06 funding year, there was no need for the Commission to rule on specific cost exclusions, it did not rule on them, and there were no other cost exclusions for VRS in the 2005-06 Funding Filing. Thus, there is no precedent against inclusion of CDI costs.

The question for the FCC is whether it is reasonable or unreasonable to include the cost of CDIs to provide VRS. As RID and Mr. Obray make clear, CDIs possess a skill set that is not available to hearing interpreters. That is native ASL fluency and deep immersion and appreciation of deaf culture. Hearing interpreters, no matter how skilled, just do not have this unique skill set to the degree of CDIs. The persons coming closest to having this skill set would be hearing children of deaf parents, sometimes called children of deaf adults ("CODA"). These persons, like Hands On President Mr. Obray, grew up with deaf parents and learned ASL at an early age to converse with their deaf parents and other deaf persons. Moreover, CODAs have early and extensive exposure to deaf culture. However, as Mr. Obray explains in his attached Declaration, ASL is still not the only language of CODAs. CODAs do not go to a K-12 deaf school. Their sole means of communication is not ASL. And their immersion in deaf culture may be significant, but should not be compared to a person who is deaf and uses sign language as a necessity in his or her daily life as the sole means of non-written communication.

Understanding of deaf culture is a key to effective VRS communication. Hearing persons cannot know what it is like to be deaf. A CDI shares with other deaf persons the fact that his or her primary means of relating to the world is visual. A CDI shares with other deaf persons a language that is visually received and gesturally produced. *See* Exhibit 4 (ASLinfo.com, Discussion of Deaf Culture). CDIs generally attend residential deaf schools that provide a vital link in the transmission of deaf culture and language. *Id.* Children are able to communicate in a language readily understood by each other. *Id.* They are able to partake in social clubs, sports and be surrounded by deaf role models. *Id.* This is not to take anything away from CODAs and other hearing interpreters, but they do not possess this shared experience and hence may be limited understandably in their ability to communicate effectively and accurately compared to CDIs.

The availability of CDIs is particularly important in stressful situations or emergencies where effective and accurate communication is imperative, and yet may suffer. *See* Exhibit 3. In an emergency, the deaf caller will be under tremendous time pressure to communicate. Gestures will likely be rapid and emphatic. The potential for frustration is high. Moreover, the caller may be injured, agitated or flustered. *Id.* In such a situation, providers should have available the most effective means for interpretation. That is undoubtedly a CDI.

In sum, the use of CDIs for VRS interpreting, when necessary for effective and accurate communication is not unreasonable. To the contrary, VRS providers are required to provide effective and accurate interpreting. In those instances where hearing interpreters need assistance to effectively and accurately interpret a call, CDIs are required by FCC Rule Section 64.604(a)(iv).

III. The attempt to arrive at a single VRS rate is problematic.

Although NECA proffers 24 different possible VRS rates, each of those proposed rates is problematic. Each is somehow based on the traditional weighted average approach, which NECA itself questioned some two year ago. Each proposed rate fails to account for the existing skewed structure of the VRS market, dominated by one provider which enjoys an overwhelming, near monopoly, share of the market. Each proposed rate fails to account for the economies of scale which can be expected to develop (and indeed are evident from the data presented from traditional TRS and STS) as individual providers serve an increasing number of users.

A. NECA continues to propose rate setting methodologies based on weighted average methodologies.

Although NECA purports to present a broad range of rates based on varying methodologies, every one of the 24 rate “recommendations” is ultimately based on the traditional weighted average methodology. As we show below, this is methodologically unsound given the existing VRS market structure the FCC has allowed to develop.

B. The market structure for VRS is skewed by past anti-competitive conduct.

Some 11 VRS providers are authorized to draw from the Interstate TRS Fund pursuant to FCC Rule Section 64.604(c)(5)(F). They are: AT&T, Communications Access Center, Hamilton Relay, Hands On, Healink, GoAmerica, Nordia, SNAP Communications, Sorenson Communications, Sprint and Verizon. Pursuant to FCC Rule Section 64.604(c)(5)(F)(4), the Commission may certify additional VRS providers, as may the several states. FCC Rule Section 64.604(c)(5)(F)(1). The Commission has plainly expressed its policy preference for competition in the interstate and Internet relay markets. *Telecommunications Relay Services,* 37 Comm. Reg. (P&F) 643 (2005).[13] *See also Telecommunications Relay Services,* 21 FCC Rcd 5442, 5447-48 (2006) ("*Interoperability Decision*"). Moreover, it is beyond dispute that the public, both deaf and hard of hearing, and hearing, have benefitted greatly from competition in VRS. Tangible benefits include, but are not limited to, Hands On's video conferencing tool, Video Sign[R], which is a decided improvement over Microsoft's

[13]The Commission saw several benefits from competition in Internet based relay, including potentially lowering the cost of relay service, giving consumers greater choice, bringing "innovation to the provision of VRS and IP Relay, both with new equipment and new service features," and more broadly stimulating greater broadband deployment. *Id.* at para. 22.

no longer supported Net Meeting software, Hands On's Service to Apple Macintosh users, Sorenson's VP-100 and VP-200 videophones, and SNAP's forthcoming distribution of the Ojo videophone, which is pioneering use of the SIP protocol for VRS.

The VRS market, however, is not at this point freely competitive. One VRS provider, Sorenson Communications, maintains a market share estimated to approach 80 percent. That market share was not gained by free competition. Rather, Sorenson's some 80 percent market share was obtained by means this Commission found to be contrary to the public interest. *Interoperability Decision,* 21 FCC Rcd at 5454-59. Specifically, Sorenson bundled the provision of a free videophone device with its VRS service. *Id.* Sorenson did this in two ways, first it contractually prohibited VRS users from using its videophone with the services of competing VRS providers; second, Sorenson engineered a block on its videophones to physically prevent, even in an emergency, access by the VRS consumer to competing VRS providers.[14] In the *Interoperability Decision,* the Commission declared "the practice of restricting the use of VRS to a particular provider — sometimes termed 'call blocking' — [] inconsistent with the TRS regime

[14]Sorenson also at one time required video phone users to use a minimum number of minutes, but ceased the practice reportedly after having been told to do so by CGB staff.

as intended by Congress."[15] Hands On certainly applaud the Commission's *Interoperability Decision*. However, by the time that decision was released, Sorenson had three years to bundle its videophone and its VRS service without regulatory restriction, and thus was able to amass its now dominant market share.[16]

[15] *Id.*, 21 FCC Rcd at 5442. The Commission also found that the practice raised serious public safety concerns. *Id.* at 5456,

[16] Since the issuance of the *Interoperability Decision*, there have been numerous reported instances of Sorenson's continued anti-competitive conduct, including placing a misleading intercept screen on its video phones, locking the address books on public video phones to prevent dialing parity between providers, and various other incidents of misbehavior by Sorenson installers, including threatening to confiscate videophones from customers on the basis of insufficient VRS minutes logged.

C. The FCC in 2005 recognized the public interest detriment of setting a VRS rate based on the weighted average and chose instead to use the median rate.

In its 2005-06 Fund Filing, NECA noted that all but one VRS provider's projected costs per minute above the weighted average and only one VRS provider's projected costs were below that figure. NECA concluded that the rate it derived from the traditional VRS rate calculation was therefore driven by the demand and cost data submitted by one provider.[17] *See* 2005-06 Fund Filing at n.32. That one provider was undoubtedly Sorenson, which at the time touted itself as providing a majority of the minutes of VRS reimbursed from the TRS Fund. NECA pointed out that with the low cost provider the blended 2005-06 VRS rate would have been $5.924. Without Sorenson, NECA calculated that the weighted average VRS rate would have been $7.061, a difference of $1.137. Based on the record evidence of the skewed market structure and the open issues of interoperability and answer speed, the Commission opted to adopt the median provider cost estimate of $6.644. *Telecommunications Relay Services*, 05-135, paras. 26-28.

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[17]At note 32 of its 2005-06 Fund Filing, NECA stated:

> The average cost per minute appears to be driven by the cost and demand characteristics of a single provider. The average produced by the traditional rate development methodology using all providers' data indicates that only one provider's cost per minute is below the

D. The FCC in 2006 recognized that providers had no certainty of the costs to include or exclude and froze the VRS rate pending resolution of a comprehensive rule making to address and resolve VRS rate issues.

In its 2006-07 rate order the Commission continued the $6.644 rate due, inter alia, to uncertainty as to the appropriate VRS cost elements. *Telecommunications Relay Services*, DA 06-1345. Concurrently, the FCC instituted a comprehensive rule making proceeding to resolve how it should

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average, while all other providers' costs are above the average. Because of the number of open issues before the FCC related to VRS, e.g., answer performance and interoperability and the timing of their resolution, and the likelihood of their adding costs to the provision of TRS, the Commission may wish to explore alternatives to the traditional rate calculation. To that end, NECA also calculated the VRS reimbursement rate excluding the low cost provider. Without that VRS provider, the reimbursement rate would be $7.061, a difference of $1.137.

compensate VRS. *Telecommunications Relay Services*, 06-106 (July 20. 2006). That proceeding is still pending.

E. In the absence of resolving the VRS rate proceeding, the FCC should maintain the rate at it current level.

In light of the pending status of the omnibus VRS rate proceeding, it would be a mistake for the FCC to adopt any of NECA's 24 proposed rates with the possible exception of the $6.7738 rate. The rules are still not clear. Providers have submitted their costs and demand figures without notice of what the Commission will ultimately adopt. And the Commission has not had the opportunity to resolve the myriad of policy issues presented with respect to the rate issue. NECA and the providers have literally been flying blind. Rather, an appropriate decision on NECA's current Fund Filing would be to continue the current rate until the Commission makes a decision on the omnibus VRS rate proceeding, that decision becomes effective, and providers have an opportunity to revise their cost and demand estimates based on the Commission's ultimate decision. Alternatively, for reasons discussed below, the Commission should adopt an interim multi-tiered rate.

F. Each of the NECA proposed rates is inappropriate because it does not account for the skewed market structure or is otherwise based on purely arbitrary adjustments designed to reduce the VRS rate.

The conclusion that each of NECA's 24 proffered rates should be rejected becomes even more manifest when it is considered that none of NECA's 24 proposed rates would be an appropriate VRS rate. Each of those rates suffers from a failure to account for the skewed VRS market structure and/or contains arbitrary and unjustified adjustments apparently designed simply to reduce the final VRS rate.

1. The weighted average rate fails to account for the skew VRS market.

As NECA demonstrated in it 2005-06 Fund Filing, Sorenson's dominant market share results in skewing the VRS rate if that rate is set based on a weighted average. That filing indicated that adopting any weighted average approach fails to account for the lop-sided market share held by Sorenson and Sorenson's effect on the rate. This is because Sorenson, now with an estimated some 4,000,000 minutes of VRS a month (or some 80 percent of the VRS market) can achieve economies of scale by spreading its fixed and semi-variable costs over a number of minutes greater by an order of magnitude than every other VRS provider. Indeed, if NECA's fund filing is to be believed, the actual weighted average cost of a VRS conversation minute for 2006 was $4.5568, while the median cost of all the submitting providers was $6.18.[18] We do not know unfortunately what the weighted average cost would be if Sorenson's significantly low figure was removed. What we do know is that the 2006 cost of half of the providers was at or above $6.18 and half of the providers was at or below $6.18, but we do not know by how much. We also know that at least one provider's costs was below $4.5568 -- at least as measured by NECA.[19] Hands On -- which believes it is the second largest VRS provider -- states for the record that its cost per minute without accounting for rate of return was within a few cents of the median $6.18 cost.

It requires no great leap of logic then to conclude the following: (1) that because of its large market share, Sorenson's costs as measured by NECA are significantly below the costs of all other VRS providers; and (2) that the actual

[18]Unfortunate, as discussed above, data which would allow verification of NECA's calculations has not been made public.

[19]Sorenson has suggested off the public record that NECA refuses to count all its expenditures in arriving at the $4.5568 number. Again, since the FCC and NECA persist in withholding necessary data from the public, there is no way to verify that claim.

cost of VRS for all other providers is likely greater than $6 a minute. Adoption of any weighed average approach then will likely overcompensate Sorenson and under-compensate every other provider, if not both.

2. The adjusted weighed average rate is not supported by the NECA Fund Filing.

For the same reasons discussed above and also for different reasons, NECA's adjusted weighted average is not supported by the Fund Filing. If in fact, NECA's adjustments are justified, the adjusted weighted average rate is still not supported by its Fund Filing because it would still overcompensate Sorenson and under-compensate every other provider. However, as discussed above, NECA has failed to justify the adjustments it made. Other than explaining that it omitted research and development expense, which Hands On discussed above, NECA has failed to specify what other adjustments it made in arriving at its adjusted weighted average rate.[20]

Hands On has been informed that one of NECA's adjustments was a video interpreter training program. If true, that is a very short sighted and ill-advised

[20]As Hands On discussed above, NECA omitted $100,000 in 2007 and in 2008 for research and development expense designed to begin to meet the current waiver for automatic routing of 911 calls. In addition, NECA apparently removed $219,649 in certified deaf interpreter ("CDI") costs for 2007 and $461,261 in CDI costs for 2008. It is not clear if NECA removed 2006 CDI costs in arriving at its so-called historical cost figure.

move. Because of the popularity of VRS, the industry is running out of interpreters. There is a need to train more interpreters so they can be available not only for VRS but for community interpreting. Otherwise, the market price of VRS qualified interpreters will continue to climb well in excess of inflation. This is not just a pay me now or pay me later issue. If action is not taken now to expand the available pool of interpreters, there will not be enough VRS interpreters available to handle the demand, VRS answer speeds will suffer, and the VRS consuming public will be denied the functionally equivalent service to which Section 225 of the Act entities it.

3. The historic cost rate and historic adjusted for inflation rate results from a skewed market structure and fails to account for current expected costs.

NECA's so-called "historic cost rate" and that rate adjusted for inflation, are likewise inappropriate VRS rates for reasons largely already discussed. First, the historic rate is really mostly Sorenson's historic cost, not the cost the other 10 VRS providers face. Second, there is no basis to assume that NECA's measure of inflation is the actual difference in costs from 2006 to the 2007-08 rate period VRS providers would actually face. Indeed, because of the interpreter shortage it can be expected that VRS rates, ceteris parabus, will rise faster than inflation.

4. The so-called adjustment for administrator demand is merely an arbitrary means to reduce the final VRS rate.

NECA's application of an adjustment factor whereby it substituted its higher demand figure for provider demand, without making any corresponding adjustment in the estimated provider costs, merely amounts to an arbitrary adjustment evidently intended to lower the final rate. NECA's own collection form recognizes there are variable costs in providing VRS, the majority of which in Hands On's experience are call center costs. Increasing the provider estimated demand while making no increase in estimated costs is irrational since it does not account for the increased costs providers must pay to handle that demand. This rate methodology also of course suffers from the impediments discussed above concerning any of the weighted average methodologies.

5. NECA's contemplation of the elimination of marketing and/or outreach expenses is contrary to the FCC rules and policies and the intent of Section 225 of the Act.

For each of its various weighted average methodologies, NECA proffers rates based on eliminating marketing, or outreach, or both. Marketing and outreach are the subject of the pending VRS cost recovery rulemaking, for which no decision has yet been made. It is inappropriate to set a rate which eliminates either of those costs without resolution of that proceeding. In any event, both marketing and outreach benefit the public and are legitimate and necessary VRS cost elements.

Marketing and outreach expenses are necessary expenses of providing TRS in general and VRS in particular. Providing the public and consumers with information on services, product availability, and training on use is a necessary element of functional equivalency. Marketing and outreach efforts principally educate consumers as to the availability of service, service providers and service options. The hearing public has the benefit of the substantial marketing efforts of telecommunications providers. The public benefits from these efforts because these efforts inform the hearing public of the availability of service and service options. VRS consumers likewise need to know which providers offer specific features that meet their unique functionally equivalent needs for communicating – such as Hands On's allowing text with VRS, and the different formats of videomail provided by different providers.

In *Fear of Persuasion*, American Enterprise Institute economist John Calfee points out that advertising has had enormous benefits for consumers.[21] It has lowered prices for many goods, such as eyeglasses and prescription drugs, and improved the welfare of consumers by providing them with information

[21]*See* Calfee, *Fear of Persuasion: A New Perspective on Advertising and Regulation* (AEI Press March 1998).

about new products and new uses for existing products.[22] Other scholars have echoed Mr. Calfee's findings.[23] Indeed, the Federal Trade Commission

[22]Mr. Calfee argues that advertising spreads information, encourages competition, and benefits consumers and the economy as a whole. Various examples include the fact that: (1) consumers in states which restricted advertisement for eyeglasses paid about 25 percent more for their glasses, and the least-educated class of consumers paid the most; (2) before cigarette advertising was heavily regulated, brands tried to compete with one another by claiming they were healthier because of lower tar or nicotine -- thus alerting the public to the health risks involved in smoking; (3) when a National Cancer Institute campaign to promote inclusion of fiber in people's diets fizzled, it teamed up with Kellogg Corporation to tout the benefits of the company's All-Bran cereal -- and within two years one-third of people surveyed were able to name fiber as a means of cutting cancer risks. Mr. Calfee further found that although about 70 percent of people say they do not believe all the claims made by advertisers, at the same time, 70 percent say they find useful information in advertisements.

[23]*See, e.g.,* Interview with John Hood, Friday Interview: Advertising's Benefits, John Hood discusses the societal benefits of advertising, *Carolina Journal Online,* available at http://www.carolinajournal.com/exclusives/display_exclusive.html?id=3143 (last visited October 23, 2006).

consistently defends advertising as essential to help consumers make informed choices. *See, e.g.*, FTC 1992 Annual Report at 16 & 51 available on line at http://www.ftc.gov/os/annualreports/ar1992.pdf (discussing efforts to enjoin industry bans on infant formula and chiropractic service advertising). Functional equivalency requires that deaf and hard of hearing and speech disabled persons likewise enjoy the benefit of provider marketing efforts.

Marketing and outreach[24] efforts plainly benefit the consumers of TRS services. First, these expenditures advise consumers of the services which are available and of the specific features available from various providers. Marketing and outreach efforts are necessary to allow consumers to reap the benefits of competition. Consumers need to know that Hands On serves MacIntosh computer users. Consumers need to know that Hands On's Video Sign[R] software provides better video quality than Microsoft's Net Meeting. Consumers need to know that they can obtain a videophone from Sorenson. Consumers need to know that they can use their Sorenson videophone with any VRS provider. Second, without branded marketing there is no way new providers could ever make themselves known in the marketplace. Thus, the

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[24]Although currently two separate categories in the annual data collection form, marketing and outreach are really one and same thing as illustrated by the historically similar definition in NECA's data collection form *See, e.g.,* Relay Services Data Request Instructions at 4 (2006 edition).

potential for additional competition and the benefits that competition offers consumers, would be stymied.

The Commission recognizes the public interest benefits of consumer access to information by requiring providers to conduct outreach. In fact, the Commission has repeatedly stressed the importance of outreach to the deaf and hard of hearing community in realizing the goals of the relay program.[25] It is hard to square the Commission's statements on outreach with excluding expenses for it. That the Commission has declined to proscribe a national outreach program is not ground for refusing to compensate providers for their own outreach efforts. Neither the Commission, nor NECA, is the appropriate entity to conduct outreach. Neither have any particular expertise in outreach, marketing or the deaf and hard of hearing community. Providers are the natural entities to conduct outreach since they are the experts in providing the service.

The role of outreach is not merely educating the hearing public to not hang up on relay calls. Surely that is part of outreach and a very necessary part; but an outreach program that ignores the very persons sought to be benefitted by the TRS program would be irrational. The purpose of outreach and marketing which

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[25]*See* Ex Parte Notice of Various Relay Service Providers, CGB Docket 03-123 (May 11, 2006) (discussing authorities).

most comports with the intent of the ADA is to educate deaf and hard of hearing and speech disabled persons of the availability and features of TRS. Likewise assisting consumers with installation services and working with broadband providers to facilitate service are also necessary and reasonable costs of making TRS available to the public.

The assumption that outreach and marketing costs are designed primarily to promote one provider's service over another, is false and illogical. Hands On's experience is that most providers have been concentrating on bringing additional users on board, not on churning users from one provider to another. Far from being a static market, VRS and other TRS services are rapidly growing. They cannot logically be growing by providers enticing each other's users away; rather the services are growing because more and more deaf and hard of hearing consumers are using relay.

That increased usage of relay in general and specifically VRS is plainly the result of providers' marketing and outreach efforts. CGB Docket No. 03-123 contains substantial and convincing evidence that VRS penetration among deaf and hard of hearing persons literate in sign language is relatively low. *See, e.g.,* Comments of Sorenson Communications, Inc. at 17 (May 17, 2006). Given this, it defies logic to assume that providers' marketing and outreach efforts are geared more to promoting their specific service instead of VRS use in general. However, the following point is critical for the FCC to understand. If providers are not allowed to promote their own service in their marketing and outreach efforts, then they are going to have little incentive to engage in marketing or outreach at all and the goal of the TRS program to provide all deaf and hard of hearing persons with functionally equivalent telephone service will be stymied.

It is also illogical to assume that VRS minutes will continue to grow if marketing and outreach expenses are eliminated from the rate. Growth of VRS minutes has been largely fueled by the marketing and outreach efforts of the various providers. If marketing and outreach are not compensated, growth in relay usage will be minimal. Although the staff has suggested its concern with the TRS Fund size, it cannot be the FCC's intention to limit growth of the fund size by choking off the flow of information to consumers concerning the availability and features of relay. That would be directly contrary to Congress's intent to promote universal service to deaf, hard of hearing and speech disabled persons.

It is likewise illogical to assume that there is a material difference between outreach and marketing. Logically, marketing/advertising is a subset of outreach, if the two are not substantially indistinguishable sets of expenditures.

This is confirmed by the virtually indistinguishable definitions NECA employed for years with respect to the two terms.[26]

It is another false assumption that it is a possible to differentiate between "branded" and "non-branded" outreach and marketing. In fact there is no practicable means of differentiating between non-branded and branded outreach and marketing. For example, how can Hands On promote VRS service to MacIntosh computer users without informing those users that Hands On is one of only two VRS provider which serves MacIntosh computer users? Similarly, how is CapTel to promote captioned telephone service without promoting itself? Or if CSD has a community meeting in Keokuk, Iowa, to promote TRS, is it supposed to refrain from mentioning who they are, and where their TRS web site can be found? These examples illustrate the difficulty of any branded/non-branded distinction. Trying to implement such a distinction would only further embroil this agency and NECA in micro-managing relay. The goal should be to adopt a compensation mechanism that minimizes agency and NECA intrusion

[26] *See Telecommunications Relay Services*, 21 FCC Rcd 7018, ___, FCC 06-1345, para. 22.

into relay, not that increases it. There is thus no basis to suggest that brand identification is not a reasonable cost item.

Hands On further notes that the assumption that marketing and outreach efforts do not lower costs to the rate payers is inaccurate. These expenses, which increase the number of deaf, hard of hearing and speech disabled persons using relay service, help to lower the per minute cost of TRS service. As minutes increase, fixed costs are spread over a larger variable cost base. Sorenson's "historical" costs, discussed above, are ample proof of the economies of scale that can be achieved.

Furthermore , the inclusion of marketing and outreach as TRS rate elements is fully consistent with the FCC's Part 32 rate of return methodology. FCC Rule Section 64.604(c)(5)(C) requires that the TRS administrator obtain and providers provide information in general accordance with Part 32. FCC Rule Section 32.6610 is the Part 32 account for marketing.[27] FCC Rule Section 32.6611 is the Part 32 account for product management and sales.[28] FCC Rule

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[27]Account 32.6610 is to be used by Class B telephone companies for the expenses listed in Accounts 6611 through 6613 by Class A telephone companies. Class A and B telephone companies are defined in FCC Rule Section 32.11.

[28]Account 6611, includes "(a) Costs incurred in performing administrative activities related to marketing products and services. This includes competitive analysis, product and service identification and specification, test market planning, demand forecasting, product life cycle analysis, pricing analysis, and identification and

Section 32.6613 is the Part 32 account for product advertising.[29] Similarly, Part 36's rate of return regulations allow these expenses in the rate of return calculation for carriers. *See* FCC Rule Section 36.372.

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establishment of distribution channels;" and "(b) Costs incurred in selling products and services. This includes determination of individual customer needs, development and presentation of customer proposals, sales order preparation and handling, and preparation of sales records." FCC Rule Section 32.6611.

[29]Account 6613 includes "costs incurred in developing and implementing promotional strategies to stimulate the purchase of products and services. This excludes non product-related advertising, such as corporate image, stock and bond issue and employment advertisements, which shall be included in the appropriate functional accounts." FCC Rule Section 32.6613.

For all of these reasons, marketing and outreach expenses are reasonable costs and should be fully compensated. NECA's inclusion of rates eliminating those expenses must be disregarded. This is especially true given the state of broadband deployment. Pew Charitable Trust states that less than half of Americans have broadband service at home. *See* http://www.pewinternet.org/pdfs/PIP_Internet_Impact.pdf. GAO pegged that number as 28 percent as of 2005. *See* GAO Report to Congressional Committee, *Telecommunications, Broadband Deployment Is Extensive Throughout the United States, but It Is Difficult to Assess the Extent of Deployment Gaps in Rural Areas* (May 2006) (available at http://www.gao.gov/new.items/d06426.pdf (last visited on October 27, 2006). VRS providers need to accelerate efforts to make broadband accessible and affordable to all those who cannot use VRS and should be able to do so.[30]

[30] It is the intention of Section 225 of the Act that deaf and hard of hearing persons should pay no more for TRS service than do hearing persons. However, cost of a high speed Internet line is considerably above the cost of a residential telephone line. The result is that deaf and hard of hearing persons using VRS do in fact pay more than hearing persons for basic telephone service. The Commission has not addressed this disparity.

G. Adoption of any of the proposed NECA rates will result either in overcompensating the dominant VRS provider or in under-compensating every other provider, in any event reinforcing the dominant provider's market position.

As shown above, each of the proposed NECA rates must be rejected. Each of those rates is based on a weighted average approach that will either overcompensate the dominant VRS provider or under-compensate all other providers, or both. The various NECA variants of the weighted average suffer from other defects as well, including making arbitrary and unexplained cost exclusions or adjustments, or exclusions of established and necessary expenses such as marketing and outreach. Adoption of a single VRS rate will serve to injure competition by strengthening the dominant provider and weakening all other providers. As the Commission has done for the last two years, it must reject NECA's proposed VRS rates.

IV. The FCC should adopt a multi-tiered VRS rate which accounts for the economies of scale present in the VRS industry.

As shown above, any of the various NECA recommended weighted average rate approaches is inappropriate given the existing VRS market structure – where one provider dominates the market with some 80 percent of the market share. Instead, Hand On endorses a tiered rate approach that accounts for the clear economies of scale present within the VRS industry.

A. There are clearly evident economies of scale present in the VRS industry.

The evidence is abundantly clear of economies of scale within the VRS industry. For example, VRS rates have steadily declined over the years as VRS has grown from its infancy. Moreover, NECA's own reporting form plainly recognizes what it categorizes as fixed, semi-variable and variable VRS costs.[31] Fixed costs generally do not increase, or increase appreciable as demand increases. Semi-variable costs may increase but not proportionate to demand increases. And variable costs increase approximately in proportion to demand.

[31]To be more accurate, the degree of cost variance of various cost categories ranges on a continuum. For example, NECA classifies land and building costs as fixed. In fact, however, those costs do vary roughly in proportion to minutes served. There is a limit to the number of minutes any one call center may serve due to geographic interpreter shortages. Thus, increases in minutes of use require the opening of additional call centers.

Fixed costs of VRS include the startup costs of providing VRS and the basic infrastructure necessary to do so, such as the Internet platform, reporting software, top management structure and headquarters costs. Semi-variable costs generally include the costs of administering the VRS enterprise as it grows, e.g., human resources, accounting, legal, and engineering costs beyond minimum staffing levels Variable costs are generally those directly related to call center operations, including telecommunications expense, video interpreters, trainers, recruiters and customer service personnel. As demand increases for any VRS enterprise, in general its costs per VRS conversation minute should decrease as more minutes of use are spread over fixed and semi-variable costs. This is certainly true vis-a-vis a competitor. It should be expected that a VRS provider serving 200,000 minutes a month should have higher costs per VRS minute than one serving 800,000 minutes a month.[32]

What reported data there is from NECA supports this conclusion. NECA's 2005-06 Fund Filing indicated that the dominant VRS provider's estimated costs were substantially below those of all other providers. Likewise, NECA's report of 2006 historic weighted average cost and median cost indicates that the dominant VRS provider's costs are substantially below other providers' costs. As

[32]Hands On's own budgeting experience is that the greater number of minutes it projects, the lower the average per minute VRS cost.

discussed above, this conclusion is likewise supported by review of Tables 1-1a and 1-3a of the Fund Filing. These tables show an inverse correlation between cost of traditional TRS and STS and total number of estimated minutes.

B. A tiered rate structure based on minutes of use per month will result in fair compensation to providers without unjustly enriching any provider.

Based on the economies of scale present within the VRS industry, a tiered rate structure as recently suggested by CSDVRS would appear best able to fairly compensate VRS providers for their costs without unjustly enriching any provider. The first tier of the tiered rate structure would largely compensate a provider's fixed costs, while subsequent tiers would reflect the cost savings achieved as those costs as spread over an increasing number of minutes of use per month. The final tier(s) of the structure would reflect the marginal cost of adding additional call centers and personnel to handle increased VRS traffic.

C. A tiered rate structure can be founded on a model of reasonable costs of a typical VRS provider.

The most obvious question with respect to the development of a tiered VRS rate methodology, is how to develop the tiers. Those tiers can best be developed by fashioning a model of reasonable VRS costs. Such a model must meet several criteria. First it must reflect the true costs of delivering functionally equivalent VRS service. Second, it must be based on valid business management criteria. Third, it must neither subsidize market entry nor penalize growth. Fourth, its must have empirical support for its major assumptions. Fifth, the model must be formula based, driven by minutes of VRS use per month, and provide an output which is reasonable across varying demand scenarios.

The necessary formulae can be readily developed to account for typical costs VRS providers face. The information is publicly available for many necessary VRS costs, such as office space requirements per employee, cost of rental space per square foot, and utility usage per square foot. Call center management software is available to project the necessary number of video interpreters to handle a given amount of VRS traffic at a given answer speed.[33] Other more specific model inputs, would be available for derivation from the myriad of provider annual cost estimates made to NECA.[34] Based on such data, NECA in consultation with the TRS Advisory Council, providers and consumers

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[33]*See* www.erlang.com (Westbay Traffic Calculators). Hands On has developed a proprietary video staffing model based on the Westbay Traffic Calculators, which it uses to project annual video interpreter requirements. Hands On is more than willing to make that model available for use in constructing a VRS cost model.

[34]Such inputs would include ratios of the number and types of administrative employees to varying numbers of video interpreters, executive requirements and salaries in relation to the size of the enterprise, average hourly wages of video

could fashion a reasonable model to approximate provider cost at various demand levels. Such a model of necessity would be based on average or representative costs of specific VRS cost elements. Plainly some providers would have specific costs for such classes of expenses above the model's assumptions and some below the model's assumptions. However, this is true as well of any cost element of a weighted average rate such as NECA is proposing. It is not necessary or possible to arrive at a perfect VRS rate; rather the goal should be to arrive at a reasonable rate given all the facts and circumstances.

D. A tiered approach would obviate the need for any type of true-up mechanism.

The elegance of a tiered VRS rate structure is that it tailor's the rate to reasonable actual costs without the need for intense FCC scrutiny of provider costs or application of a true up mechanism. As has been discussed in Docket 03-123, application of a true-up to VRS is highly problematic. *See* Hands On's Comments on the *FNPRM's* at 9-13. Sorenson's Comments on the *FNPRM* at 49-51.

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interpreters, average cost of benefit plans, etc.

The TRS cost recovery scheme should encourage efficiency and discourage inefficiency. A true-up, on the other hand, would reward a provider who loses money under the rate by making up the deficit and would penalize a provider who was able to make a profit. The true-up also suffers from the disadvantage of requiring the Commission or the TRS Fund administrator to closely monitor actual expenditures and to evaluate the reasonableness of each of those expenditures on a post hoc basis. Issues of reasonableness have been most trying over the last several years. A true-up would further encourage providers to pad their costs. The VRS cost recovery methodology should limit as far as possible the need for detailed Commission or TRS Fund administrator oversight of providers, rather than increasing it.

Moreover, the very nature of the true-up would require the Commission and/or NECA to engage in a post hoc examination of the reasonableness of costs. In other words, providers' expenditures would be examined for reasonableness *after* having been made. That procedure would be a recipe for disaster. At least under the current scheme, the review of the reasonableness of costs is accomplished *prior* to incurring those costs. Providers can, under the current scheme, know in advance whether a proposed expenditure will be deemed reasonable and decide whether or not to make it. Under a true-up mechanism, however, providers could be left in the dark as to the reasonableness of an expenditure until well after it is made. This would apply not only to a class of expenditures, but also to amounts. Such a scheme would therefore be grossly unfair to providers who should not have to guess whether the Commission or NECA would consider an expenditure reasonable before they make it.

The likely result of any true-up approach would be to chill providers from making expenditures designed to improve their service to the deaf and hard of hearing community, lest the Commission or NECA decide post hoc that the expenditure was not reasonable and impose a serious financial penalty on the provider. This would plainly hamper achieving the goal of fostering and maintaining functionally equivalent service to deaf and hard of hearing persons. A reasonable, risk adverse provider would be unwilling to make an expenditure unless that provider had assurance it would receive compensation for it. Innovation would likely be stifled and the benefits of competition would largely be rendered nugatory.

Not only would adoption of a true-up mechanism be unfair to providers and hinder service to the deaf and hard of hearing (and the hearing) community, it would also serve to increase substantially the Commission's workload. Not only would the Commission have to spend substantial time flyspecking the books of providers, it would also have to resolve innumerable issues of the reasonableness of expenditures with corresponding petitions for reconsideration, applications for review and potential court challenges. It would likely also be bombarded with requests for declaratory rulings as to the reasonableness of proposed expenditures.[35]

[35]The availability of declaratory ruling relief does not resolve the problems with a true-up. Declaratory ruling proceedings are costly in terms of legal fees. Moreover, declaratory rulings do not emanate from this agency at lightning speed. Providers need the flexibility to implement business decisions quickly and should not have to wait months or years for the Commission to decide whether an expenditure is reasonable or not. At least under the current procedures the Commission must act in the first instance on rate issues teed up in NECA's rate proposal prior to July 1 of each year.

The staff has made it clear that a motivating factor behind using a true-up mechanism is its belief that one or more providers has earned well in excess of its (their) costs. *See FNPRM* at para. 29. Putting aside the difficulty in responding to this view suggestion in light that the Commission has chosen not to release either provider cost projections or actual financial data, the tiered approach fully addresses this concern by tailoring VRS payment to the economies of scale of the VRS market.

In the *FNPRM,* the Commission in discussing a true-up mechanism, cited to the Interstate Common Line Support mechanism as a potential cost recovery model. *See FNPRM* at para. 236 n. 662. That program is not analogous to TRS. That program is a funding mechanism for universal service, i.e., a subsidy program for high cost *lines,* and is compensated on a *per line* basis. TRS is a telecommunications *service* to provide deaf, hard of hearing and speech disabled persons access to the telephone network – the costs of which are dependant principally on the number of minutes of use, which serves as the basis of compensation. The cost recovery procedures established for universal service would be far more complicated, unnecessarily so, if applied to TRS, compared to the per minute cost recovery scheme currently used for all TRS services. This is a critical distinction between TRS and the process for Interstate Common Line Support payments.

The nature of the Interstate Common Line Support mechanism is such that the calculation methodology and cost elements are set forth specifically in the rules; the mechanism is designed to compensate for a very specific class of costs; and the mechanism does not involve either the FCC or the universal services administrator in questions of reasonableness of expenditures. *See generally* FCC Rule Sections 54.901-54.904. Accordingly, the true-up payment is easily calculated based simply on LEC and CLEC line counts without detailed review of the myriad of cost elements or evaluation of the reasonableness of expenses. *See generally Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent LECs and IXCs*, 16 FCC Rcd 19613, 19665-89 (2001); FCC Rule Section 54.903(a)(3).

In sum, use of a true-up mechanism would be unnecessary with a tiered compensation methodology as there would not be a substantial danger of providers over-earning. The use of a true-up would unnecessarily increase NECA's and the FCC's workload. The use of a true-up would create greater uncertainty with respect to the FCC's view of the reasonableness of provider costs. Thus, a true-up is a bad idea whose time has simply not come.

E. Key elements of the tiered rate structure.

The tiered rate structure should include the following elements. First, to provide stability to the industry, the tiered structure should remain in effect for at least a three year period. Second, the rate model should span a number of tiers so as to closely tailor costs to monthly minutes of use. Third, the various tiers should remain in place over the minimum three year period, with adjustments only for inflation, unforseen changes in regulatory requirements, and, as applicable, for overall productivity gains as has been suggested with respect to a capped rate structure.

V. NECA should be tasked with developing a tiered VRS compensation model in consultation with the TRS Advisory Council, providers and the consuming public; in the interim, the FCC should continue the current rate or adopt a simplified tiered approach for the 2007-08 fund year.

As discussed above, NECA should be tasked in consultation with the TRS Advisory Council, providers and the consuming public to develop a three-year, tiered compensation model subject only to adjustment for inflation or substantially changed regulatory requirements. For the 2007-08 fund year, however, while NECA is deriving the appropriate costing model, the FCC should adopt one of the following approaches: (1) it should freeze the rate at its current level or (2) adopt an interim simplified tiered rate structure.

Should the FCC adopt an interim tiered rate structure, Hands On suggests that the first tier should be set at $7 for minutes 1 to 500,000. After that, Hands On lacks sufficient data to make any other rate recommendation. The basis for the $7 rate for the first 500,000 minutes of VRS is NECA's oral representation at the recent TRS Advisory Council meeting that this rate was the unweighted average of the various provider rates. As such, this figure represents a reasonable approximation of the cost of providing a modest level of operations. This level is necessary in light of the need for substantial research and development efforts with respect to implementing a numbering scheme and automatic call routing. As to tiers beyond the first 500,000 minutes, the FCC and NECA may have sufficient data to fashion those tiers, but unfortunately, Hands On does not.

VI. Conclusion.

As shown herein, application of any VRS rate based on a weighted average method will result in overcompensation of the dominant VRS provider or under-compensation of all other providers, or both. Rather than adopt a true-up mechanism which will thrust the FCC and NECA even more deeply into second guessing provider management decisions, the FCC should task NECA with developing a three year, multi-tier VRS cost model that will achieve fair compensation across all demand points. For the 2007-08 rate period, pending adoption of a fully tailored multi-tier rate model, the FCC should either continue the current rate or adopt an interim simplified tiered rate structure.

Respectfully submitted,

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